(2)

Supreme Court, U.S.
FILED
FEB 7 1996
CLERK

No. 95-831

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CANAVERAL PORT AUTHORITY,
COASTAL STEVEDORING COMPANY, AND
PORT CANAVERAL STEVEDORING, LTD.,

Petitioners,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO
AND THE NATIONAL LABOR RELATIONS BOARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

ERNEST L. MATHEWS, JR.
MAURA R. CAHILL
GLEASON & MATHEWS, P.C.
26 Broadway, 17th Floor
New York, N.Y. 10004
(212) 425-3240

Counsel for Respondent
International Longshoremen's
Association, AFL-CIO

25 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 4

1. The Decision of the D.C. Circuit Does Not Undermine But Furthers the Congressional Policy Enacted in the NLRA 4

2. The Decision Below Does Not Conflict With the Decision of Any Other Court 6

3. The Court of Appeals Properly Thwarted the NLRB's Attempt to Misapply the Law of Agency 10

4. This Case Is Not of Exceptional Importance So as to Require Supreme Court Review 16

CONCLUSION 21

TABLE OF AUTHORITIES

Cases: **Page(s)**

American Trucking Associations v. NLRB,
734 F.2d 966 (4th Cir. 1984), *aff'd*,
473 U.S. 61 (1985) 9

Aurora Packing Co. v. NLRB,
904 F.2d 73 (D.C. Cir. 1990) 15

Cagle's, Inc. v. NLRB,
588 F.2d 943 (5th Cir. 1979) 15

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 15,16

Dowd v. International Longshoremen's Association,
975 F.2d 779 (11th Cir. 1992) ..... *passim*

Humphrey v. International Longshoremen's Association,
548 F.2d 494 (4th Cir. 1977) 9

International Longshoremen's Association v. Allied International, 456 U.S. 212 (1982) 4

Longshoremen (Shipside Packing Co.),
227 N.L.R.B. 659 (1976) 13

NLRB v. Denver Building & Construction Trades Council, 341 U.S. 675 (1951) 9

North American Van Lines, Inc. v. NLRB,
869 F.2d 596 (D.C. Cir. 1989) 15

Page(s)

Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80 (1943) 14

United Pipefitters Local 280 (Aero Plumbing Co.), 184 N.L.R.B. 398 (1970) 13,14

Walsh v. International Longshoremen's Association, 630 F.2d 864 (1st Cir. 1980) 9

Statutes:

29 U.S.C. § 152(13) 7

29 U.S.C. § 158(b)(4)(i) ..... *passim*

29 U.S.C. § 158(b)(4)(ii) ..... *passim*

29 U.S.C. § 160(l) 8,9

Miscellaneous:

Restatement (Second) of Agency (1958) 11

No. 95-831

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CANAVERAL PORT AUTHORITY,
COASTAL STEVEDORING COMPANY, AND
PORT CANAVERAL STEVEDORING, LTD.,
Petitioners,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO
AND THE NATIONAL LABOR RELATIONS BOARD,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

Respondent International Longshoremen's Association, AFL-CIO, ("ILA") submits this brief in opposition to the petition for a writ of certiorari filed by Canaveral Port Authority, Coastal Stevedoring Company and Port Canaveral Stevedoring, Ltd.. The ILA was the petitioner in the review

proceedings which gave rise to the decision below. Petitioners herein were intervenors below. The National Labor Relations Board ("NLRB"), which was the respondent and unsuccessful party before the District of Columbia Circuit, did not seek review by the Supreme Court. Respondent ILA is informed that the Board through the Solicitor General intends to submit respondent's brief on this petition.

STATUTORY PROVISIONS INVOLVED

Section 8(b)(4)(i)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4)(i)(B), Pet. 2-3,[1] although omitted from the petition's statement of Statutory Provisions Involved, is highly relevant to this case. The material portions of the statute, including the language deleted by petitioners, are:

> It shall be an unfair labor practice for a labor organization or its agents —
>
> . . . (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . .

---

[1] References to the Petition will be denoted "Pet. _____." References to the Appendix to the Petition will be denoted "App. at _____."

. . . (B) forcing or requiring any person to cease . . . doing business with any other person, . . .

STATEMENT OF THE CASE

Petitioners seek review of a decision of the Court of Appeals for the District of Columbia which granted the ILA's petition to review and set aside a decision of the NLRB and denied the Board's cross-petition for enforcement. By attributing the conduct of Japanese trade unions acting in Japan to the ILA on a theory of "agency," the NLRB had ruled that the ILA violated the secondary boycott proscriptions of the National Labor Relations Act ("NLRA"). The foreign unions in support of the ILA's dispute with employers in Florida threatened to refuse to unload from ships in Japan fruit that had been loaded in Florida by non-union labor. The circuit court overturned the NLRB's determination, holding that the Board had erred in finding that conduct in Japan by Japanese unions could be attributed to the ILA because the American union's request and thanks for support made the Japanese unions its agents. The court unequivocally dismissed the Board's theory as unsupported by precedential authority and premised on an erroneous application of agency law principles.

With minor reservations, which do not go to the question of whether this Court should grant review, Respondent ILA is in basic agreement with the petition's statement of the facts and proceedings below, though not with the characterizations petitioners seek to impose on them.

REASONS FOR DENYING THE WRIT

The petition sets forth six untitled arguments which it hopes will induce this court to grant a writ of certiorari. Most of these are mere expressions of disappointment with the decision below and never rise to the level of reasons —even insufficient reasons— for granting the writ. None is important, much less compelling. Basically, the petition should be denied because there is nothing in this simple, straightforward, albeit unusual case that warrants review by the Supreme Court.

1. The Decision of the D.C. Circuit Does Not Undermine But Furthers the Congressional Policy Enacted in the NLRA

Petitioners' first line of attack is to suggest that the decision of the District of Columbia Circuit somehow undermines the goals and purposes of the secondary boycott proscriptions of the NLRA as articulated by this Court most recently in *International Longshoremen's Ass'n v. Allied Int'l*, 456 U.S. 212 (1982). Pet. 11, 13-14. This argument presents not so much a reason for Supreme Court review as a philosophical disagreement between petitioners and the court of appeals. At bottom, petitioners' claim of error by the D.C. Circuit is really a divergence in jurisprudential approach. Like the NLRB and the Eleventh Circuit in *Dowd v. International Longshoremen's Ass'n*, 975 F.2d 779 (11th Cir. 1992), reproduced at App. at 50a-72a, petitioners see the NLRA as articulating general national labor policies and setting loose the NLRB to further those policies. In their view the Board has *carte blanche* so long as its actions are not specifically forbidden. The Eleventh Circuit, cited with approval by the Board, *see* App. at 40a-41a, concludes, "[N]othing in the text or intent of the NLRA compels us to allow the ILA to evade responsibility . . ." *Dowd*, App. at 72a.

Thus, the dominant appeal in the petition is to policy considerations and to the general principle that the Board's role is to apply its expertise to formulate national labor policy. *See* Pet. 28-29; *cf.* App. at 38a ("We further believe that policy considerations support a finding of agency here."). Petitioners predict catastrophes looming in the wake of the court of appeals' decision, Pet. 23-28, and reason that, because the NLRA proscribes secondary boycotts, the Board has limitless power to prevent them whenever and wherever they may be suspected. Pet. 11-13. The linchpin proposed for this rationale is that the Board is allowed to "liberally" construe agency concepts to effectuate the policies and purposes of the Act. *See* Pet. 11-12; 15-16. This is nothing more than a demand that the traditional agency principles which Congress incorporated in the statute yield to the Board's outcome oriented attitude. The elastic approach taken by the NLRB in applying agency principles, here, however, expanded the concept of liberal construction beyond the breaking point.

The court of appeals was eminently correct in rejecting the notion that the end of avoiding a secondary boycott justifies the means of faulty legal analysis. The court based its decision on a careful examination of the structure of the NLRA, its legislative history and judicial precedent. App. at 14a-21a. It observed that the Act does not contain a blanket prohibition of secondary activity. Rather, it is carefully crafted by Congress to outlaw certain well-defined conduct. App. at 21a. The decision below cites the Act's adoption of common law agency principles and thoroughly examines the legislative and judicial rationale for that inclusion. App. at 14a-15a. It recognizes that Congress limited the § 8(b)(4)(i) proscription against inducing employees of employers in commerce. App. at 11a. It refuses to allow the Board to use § 8(b)(4)(ii)'s proscription against threats to employers to make up for the lack of induced domestic employees in this case through the device of bogus agency labels. In short, the court of appeals saw clearly that,

while the Board certainly has the authority to apply its expertise and make policy, that power must be exercised within the legislated framework, that even the NLRB is not authorized to go beyond the Act Congress passed by twisting the statutory language and mangling agency concepts to achieve a preordained result which it deems desirable.

The court of appeals properly recognized that the NLRA as enacted by Congress does not prohibit what the ILA did in this case, for the union's conduct fell neither under § 8(b)(4)(i) nor § 8(b)(4)(ii). The court's only sin was to not permit the NLRB to correct that perceived flaw in the statute by manipulating agency concepts. In conclusion, the court of appeals admonished that any changes to the Act's provisions must be made by Congress, not by the Board or the courts. App. at 22a. In our polity this attitude can not be faulted.

Petitioners urge a policy of winking at the NLRB's perversion of the statute's language in the name of serving the purpose of the statute. That policy is patently mischievous, and its rejection by the court below does not warrant this Court's review.

2. The Decision Below Does Not Conflict With the Decision of Any Other Court

Petitioners conjure up "conflicts" between the decision below and other courts in not one, but two, areas. Unfortunately for petitioners, neither of the perceived antagonisms amounts to a real conflict.

First, petitioners claim that the "D.C. Circuit's strict application of common law principles to the NLRA is in conflict with the approach of virtually every other circuit." Even if true, this kind of disagreement would afford no ground for granting the writ. And the claim is not true but is premised

upon a misconstruction of what the court of appeals did.[2]

While conflicts among the circuits are a classic ground for granting Supreme Court review, the conflict must be between *decisions* of courts of appeals, not merely between their "approaches." Indeed, that petitioners must fall back on the imprecise term "approach" to construct a disagreement in the circuits itself demonstrates that no real conflict such as would warrant granting the writ exists.

Moreover, petitioners mischaracterize the D.C. Circuit's approach. That court like others has recognized that in the framework of the NLRA agency principles are to be applied broadly, *see* App. at 19a. It in no way retreated from that position in this case. Here, however, the Board went far beyond liberal application of agency law, and the lower court, mindful of the express provisions of NLRA § 2(13), 29 U.S.C. § 152(13), was not willing to jettison agency principles altogether. Far from being out of sync with other circuits or the NLRB itself, the D.C. Circuit noted that the Board and its allies could not point to a single decision, judicial or administrative, as precedent for its finding of agency in this case.[3]

The court did not, as petitioners suggest, hold that common law agency principles should be "strictly applied" in a labor law setting. *See* Pet. 15. Rather, it found

> . . . the Board's theory depends not upon a liberal construction of agency principles, but upon

---

[2] This attempt to manufacture a conflict among the circuits by citing cases which apply a liberal agency analysis after NLRA § 2(13), 29 U.S.C. § 152(13), was enacted, Pet. 15-16, n. 8, is easily deflated. None of those cases addressed the issue before the Board and the D.C. Circuit.

[3] Nor do petitioners succeed in establishing a conflict among the circuits on the deference to be accorded Board decisions. The cases cited at Pet. 16, n. 9 hold that deference is given to factual findings by the Board. In this case the facts were stipulated to and the Board drew from them the legal conclusion of agency status to which the court does not defer.

a complete abrogation of such principles.

App. at 21a.

Second, petitioners urge that the D.C. Circuit's decision conflicts with that of the Eleventh Circuit in *Dowd*, the related NLRA § 10(l), 29 U.S.C. § 160(l), injunction proceeding that preceded the Board's decision on the merits. If true, this claim would present a classic ground for Supreme Court review, though hardly of enough importance to warrant granting the writ. But the claim is not true. Any disagreement between the District of Columbia and the Eleventh Circuit as to the merits of the Board's agency theory is not the kind of conflict that requires resolution by this Court.

The *Dowd* court was reviewing the issuance of a preliminary injunction by a district court under a standard of review of whether the Board's legal theories were substantial and nonfrivolous. *See* App. at 54a-55a. The Eleventh Circuit's discussion of the agency relationship between the ILA and Japanese unions is classic dictum. It goes well beyond what was required to decide the case before the court and delves into the merits of the alleged unfair labor practice. The Eleventh Circuit's actual holding, however, is limited to the determination that the Board had reasonable cause to believe the NLRA was being violated. This is not to deny that the Eleventh Circuit panel undoubtedly takes a view of the Board's theory of agency contrary to that of the D.C. Circuit in this case.[4] It cannot be seriously maintained that dictum, however strenuous, is sufficient to create a conflict between courts of appeals so as to warrant the involvement of this

[4] Indeed, the Eleventh Circuit went even further than the Board ultimately did in finding some theory on which to attribute the conduct of the Japanese unions to the ILA. The court of appeals found reasonable the Board's General Counsel's theory that the ILA and Japanese unions were engaged in a "joint venture." App. at 61a-62a.

Court.[5]

Because the district court and any reviewing court must prescind from consideration of the merits of the underlying unfair labor charge and base their decisions solely upon whether reasonable cause exists to believe a violation has occurred, *Dowd*, App. at 54a, decisions on applications for § 10(l) injunctions are not binding via the doctrine of preclusion on the NLRB in its own determination nor on the circuit courts on petitions for review and enforcement of Board orders. *NLRB v. Denver Bldg. & Constr. Trades Council,* 341 U.S. 675, 682 (1951). Given the lack of preclusive or precedential value, except in other § 10(l) proceedings, *See Walsh v. International Longshoremen's Ass'n*, 630 F.2d 864 (1st Cir. 1980), a decision under § 10(l), even by a circuit court, is not on an equal footing with other court decisions so as to create a conflict triggering this Court's review. To view the matter otherwise would be to create an inside track towards obtaining a writ every time an NLRB decision is reversed in a case where the agency had previously obtained, virtually for the asking, relief under § 10(l).

---

[5] The reality is that a court's preview on a § 10(l) injunction proceeding of what position it may take on the merits of the underlying unfair labor practice charge is less than reliable. Courts can and often do come to different conclusions in subsequent review proceedings. *Compare Humphrey v. International Longshoremen's Ass'n,* 548 F.2d 494, 499-500 (4th Cir. 1977) (the Fourth Circuit, noting that its function in reviewing a § 10(l) injunction proceeding concerning the legality of contractual work preservation rules was preliminary and not a decision on the merits, stated, "[t]hus, if this matter were before us for final decision, we would be inclined to hold that the rules . . . constitute a 'hot cargo agreement' in violation of § 8(e)"), with *American Trucking Ass'ns v. NLRB*, 734 F.2d 966, 980 (4th Cir. 1984), *aff'd*, 473 U.S. 61 (1985) (where on subsequent review of the Board's adjudication that some of the same contractual work preservation rules violated the NLRA, the Fourth Circuit said, "[w]e hold that the Rules are lawful in their entirety and may be enforced").

3. The Court of Appeals Properly Thwarted the NLRB's Attempt to Misapply the Law of Agency

Petitioners devote their greatest energies to an effort to show that the court of appeals erred in applying the law of agency within the context of the NLRA. *See* Pet. 16-22. Were they correct, it would still not be a ground for granting the writ, since the Supreme Court does not sit as a court of errors and appeals to correct the lower courts' mistakes in the application of common law principles. But petitioners are in error. The D.C. Circuit was eminently correct in rejecting the Board's agency concoction.

It profits little to here address and expose the fallacies of each pot-shot petitioners take at the decision below. All petitioners' arguments suffer from the same underlying error. They seek to perpetuate the Board's Procrustean effort to stuff the facts of this case into traditional concepts of agency, where they simply will not fit. A request becomes "authorization," a thank you "ratification," the mere mention of the ILA by the Japanese unions "apparent authority." Petitioners' real quarrel with the D.C. Circuit is that the court refused to permit the NLRB to play these Orwellian word games.[6]

Petitioners zero in on the court's recognition that the ILA had no control over the Japanese unions to urge the mutually contradictory arguments (1) that the D.C. Circuit erroneously believed that right of control is a *sine qua non* for an agency

[6] That petitioners — and the Board — feel compelled to enlist several mutually exclusive agency concepts is most telling. There is no doubt that the ILA asked the Japanese unions for help. If that amounted to "authorization," then no "ratification" was required to create, *post hoc*, authority that had never been given. And no one denies that the ILA thanked the Japanese unions. If this were "ratification," if there was both authorization and ratification, there is no need to invoke "apparent authority." This belt and suspenders *and* buttons approach by the Board betrays an obvious lack of confidence in any of them to bear the weight of its theory.

relationship and (2) that the ILA did have sufficient control to meet the test set forth in the *Restatement (Second) of Agency*, § 1 cmt. b. (1958). Pet. 16-18. The latter claim is the wonderful tautology that there must have been control because when the ILA asked for help, the Japanese unions gave it, and when the ILA asked them to stop, the Japanese unions stopped.

All petitioners' attempts to apply common law agency concepts to the circumstances of this case suffer from a common conceptual flaw. They fail to recognize the basic ingredient of agency that an agent acts in the place and stead of the principal, doing what the principal himself could do. All the palaver about how much control is necessary,[7] *see* Pet. 17-19, pales in significance next to this key concept of agency. When we say that an agent is acting "on behalf of" a principal, we do not mean he is doing something nice for the principal or something that will benefit the principal. We mean that he is doing something that the principal has the capacity to do.

The illustration of an agency relationship from the *Restatement (Second) of Agency*, § 1 cmt. b., proffered by petitioners, *see* Pet. 17, is instructive with respect to all petitioners' misapplications of agency principles. In the example, A asks a friend, B, "to do a slight service for him, such as to return for credit goods recently purchased from a store." *Id.* The *Restatement* correctly states that in returning the goods

---

[7] Petitioners wrong the court of appeals by suggesting that the decision both makes a permanent relationship the *sine qua non* of agency and also implies that independent entities cannot be agents of another. *See* Pet. 17-19. The D.C. Circuit did not indulge in absurdities. A principal and agent must be separate entities, otherwise one would have not agency but identity. The court was not saying that permanence or identity are always necessary to agency. Rather, it was pointing out that the only precedent the NLRB could invoke had those attributes and so failed to provide any authority for the Board's agency holding in this case, where they were lacking. The circuit court also recognized the self-evident, that there was nothing in the relationship between the ILA and the Japanese unions that could justify calling that relationship agency.

B is acting as A's agent. The example applies throughout the various agency concepts that petitioners, like the Board below, attempt to engraft onto this case. A has given B the goods and asked him to return them to the store (express actual authority). A has not asked B to return the goods, but B takes them anyway on his own initiative, and afterwards A approves his conduct and thanks him (ratification). B shows up at the store with the goods the storekeeper knows to be the ones sold to A and requests a credit to A's account (apparent authority).

But note: in each application of the example *the goods that B was returning were A's goods*. The story is very different if one substitutes B's goods, — if A, who has a dispute with the store, asks B to support him by withholding B's patronage and returning goods that B has purchased. A cannot compel or direct B with respect to B's property. A cannot "authorize" B to return B's own goods. A's thank you cannot make A in any way retroactively responsible for B's conduct with respect to B's goods, so as to be called ratification. A storekeeper receiving back from B the goods sold to B cannot be misled into thinking that B is acting for A.

In this case the Japanese unions, B, acted solely with respect to their own goods, —*i.e.*, the labor of their own members. Their threats in Japan, which the NLRB found to be the only conduct that violated the Act, App. at 32a, 38a,[8] were not that the ILA would refuse to handle but that the Japanese dockworkers would refuse to handle goods loaded by nonunion labor. The message that the Japanese unions were conveying to their employers was not a communication from the ILA; it was their own message. The ILA had no power to call

---

[8] The NLRB conceded that the activities of the ILA were not part of the allegedly unlawful conduct. App. at 32a. "All the allegedly unlawful acts were committed solely by the Japanese unions." *Id.* It recognized that the Japanese unions in Japan were not subject to the Act. App. at 34a. It created a "secondary boycott" by attributing the conduct of the Japanese unions to the ILA solely under an attenuated theory of agency.

a strike in Japan of persons who were not ILA members. It had no authority in Japan that it could delegate. The ILA could request, beg, importune assistance, but it could not direct, —because the goods were B's, not A's. Thus, the conduct of the Japanese unions, though taken at the request of the ILA, can in no rational sense be said to be the conduct *of* the ILA. The court of appeals correctly rejected the Board's attempt to hold otherwise.

In suggesting that the decision held that there must be some formal affiliation for an agency to exist, petitioners again do the court of appeals an injustice. The issue of affiliation came up in the context of the NLRB's reliance on two earlier decisions, *United Pipefitters Local 280 (Aero Plumbing Co.)*, 184 N.L.R.B. 398 (1970) and *Longshoremen (Shipside Packing Co.)*, 227 N.L.R.B. 659 (1976), as the sole precedent for its decision in this case.[9] The D.C. Circuit held that these cases did not provide the authority the Board required. The decision correctly points out that "in nearly 50 years of Board and judicial precedent" under the NLRA there is not a single case which finds that a relationship like that between the ILA and the Japanese unions is an agency. App. at 4a-5a.

The court easily distinguished the two decisions that the NLRB itself had relied on. Unlike the completely independent unions in this case, *Aero Plumbing* and *Shipside Packing* involved affiliated local unions working for the same employer under the same collective bargaining agreement. Moreover, in attributing the acts of one local to another in those cases the Board did not do so on the theory that one was the agent of the

---

[9] Petitioners' claim that the Board applied "well-established precedent", *see* Pet. 11, is hyperbole and overstates the Board's analysis. The fact is that *Aero Plumbing* and *Shipside Packing Co.*, the two cases relied upon by the Board, were never cited by General Counsel or the intervenors or the *amici* or by any jurist in the § 10(l) proceeding, nor were they raised to the Board at oral argument. The cases surfaced for the first time in the Board's decision. Apparently no one else perceived their precedential value.

other. The word "agency" is not mentioned in either decision, except in unrelated contexts (a "business agent," a "collective bargaining agent," etc.). In the absence of precedential authority, the court perceived that the NLRB was saying that the ILA/Japanese unions relationship was an agency because the Board said it was. The D.C. Circuit refused to countenance that kind of Humpty-Dumpty jurisprudence.

None of the cases cited to this Court supplies the precedent lacking in the Board's ruling. They are simply more of the same. Of the two cases cited at Pet. 19, n. 11, one involved affiliated locals governed by the same International Constitution as in *Aero Plumbing*. The other involved unaffiliated unions but was a situation where the unions were jointly seeking work at a job-site and jointly threatened the employer, thus falling into the "joint venture" category, which the Board declined to adopt as a basis for its decision.[10] The cases cited as authority that one union can be the agent of an independent union, *see* Pet. 19, n. 12, involve either unions engaged in a joint venture or a trades council with its own constitution and by-laws which was held to be a separate labor organization from its constituent affiliated local unions. The cases cited at Pet. 20-21, nn. 13, 14, involve persons actually engaged by unions to solicit authorization cards in an organizational campaign or union members and representatives whose acts in picketing are attributable to their union. The cases cited at Pet. 21, n. 17, involve strangers acting as "organs of communication" of an employer's — not their own — message. These

[10] In the *Dowd* litigation and before the NLRB, the Board's General Counsel and petitioners herein had urged "joint venture" as an alternative theory to impose vicarious liability on the ILA. The Board's subsequent decision on the merits rejected the joint venture theory and relied solely on agency. In this Court, petitioners seek to resurrect the "joint venture" theory on which the Board did not rely. *See* Pet. 19, n. 12. This is, of course, impossible under *Securities and Exchange Comm'n v. Chenery Corp.*, 318 U.S. 80 (1943), which requires that an administrative decision be reviewed on the grounds adopted by the agency.

"perception of authority" cases are indistinguishable from *Cagle's, Inc. v. NLRB*, 588 F.2d 943 (5th Cir. 1979), which the D.C. Circuit analyzed and rejected. App. at 20a-21a. In rejecting these cases as precedent in the situation where the Japanese unions were stating their own, not the ILA's intention, the decision below in no way threatens application of their principle in the appropriate circumstances, as petitioners would suggest. *See* Pet. 21.

Petitioners ultimately fall back on the old argument that the court of appeals applied the wrong standard of review by according "no deference" to the Board's legal analysis rather than the considerable deference required by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and other decisions of this Court. *See* Pet. 28-29. On the contrary, the "limited deference" accorded by the Circuit, *see* App. at 15a, was in perfect consonance with the law's demands. This case was before the NLRB on a stipulated record. Pet. 7. The Board's determination of agency was purely a conclusion of law. It involved not an interpretation of the labor act but *common law* principles of agency, which the NLRA explicitly incorporates. *See* App. at 14a. Thus, the NLRB's labor law expertise was not implicated, and the court was in as good —if not better— a position to make the legal conclusion as the Board.[11] Even so, the court went further than the limited deference analysis. Citing *Chevron*, the decision notes that if full deference were accorded, the Board's decision was so lacking in legal support, it would still be rejected as an unreasonable interpretation of agency law.

[11] The court of appeals relied upon well-established precedent in the circuit: *Aurora Packing Co. v. NLRB*, 904 F.2d 73 (D.C. Cir. 1990) and *North American Van Lines, Inc. v. NLRB*, 869 F.2d 596 (D.C. Cir. 1989), which held that a Board determination of employee vs. independent contractor status is a determination of "pure agency law" so that deference under the *Chevron* doctrine is not applicable and noted further that, where principles of agency law are applied to *undisputed facts*, the Board's administrative expertise is not involved. 869 F.2d at 598.

App. at 16a, n. 5.

4. This Case Is Not of Exceptional Importance So as to Require Supreme Court Review

Petitioners seek desperately to create a counterfeit importance to this case by conjuring up scenarios of lawless unionism and international chaos.[12] *See* Pet. 12, 23-28. The demons fade in the light of reason. The scenario of this case is not likely to be repeated. Here the American union openly sought the help of the foreign union. Were the Board's decision to be upheld, any other unions so disposed will have been well instructed. Requests for help in the future would be more veiled. As the D.C. Circuit noted,

> The Board at oral argument acknowledged that the ILA could have evaded an unfair labor practice finding in this case merely by publicizing its labor dispute with Florida stevedoring companies and then disclaiming responsibility for any assistance offered by other unions, for in that case a critical element of the Board's agency theory—the ILA's request for specific assistance—would be absent. Moreover, the

---

[12] Petitioners, like the Board before them, *see* App. at 37a, would insinuate the facsimile machine into their treatment of the case, *see* Pet. 6, 25. This is but an attempt to flavor the case with a sense of immediacy, to inflate its importance by creating an air of contemporaneity. *Fin de siecle* worldwide communications had nothing to do with the material events in this case. The dispositive actions —the Japanese unions' decision not to handle and the communication of that threat to their employers —all took place in Japan. The information was transmitted to the Japanese recipients well before the fateful date when the threats would be executed and was no more effective than if carried by Pony Express. That companies in the United States learned of their misfortune through the miracle of modern fax changes the realities not a whit and is completely irrelevant.

> Board's theory appears to have little application beyond this case. Even were we to uphold the Board's decision, unions in future cases surely could seek aid from their foreign counterparts without expressly soliciting such assistance as the ILA did here.

App. at 22a.

To resurrect the NLRB decision, then, would be a venture in futility. The expenditure of the resources of this Court is hardly warranted to reinstate a Board decision that is intrinsically impotent.

Petitioners' cry of "Wolf!" is particularly disingenuous when they claim that the decision "would allow unions in the United States to make unlawful threats through the intermediary of unions that are not part of the same international." *See* Pet. 27. Actually, the court of appeals' decision could apply only in unusual and discrete situations involving foreign unions. Had the same conduct involved two American unions, it would be proscribed by NLRA § 8(b)(4)(i), which forbids the inducement of employees of an employer in commerce to strike or refuse to handle goods. Since the Japanese unions' members' employers, stevedores in Japan, are not in commerce, the Board could not invoke subsection (i) but had to proceed under § 8(b)(4)(ii), which prohibits a union from threatening or coercing.[13] But, as the Board always conceded, the only threats or coercion emanated solely from the Japanese unions, whose activities in their homeland are clearly not

---

[13] All the charges originally filed with the NLRB by petitioners herein included a claim that the ILA had violated NLRA § 8(b)(4)(i)(B) "by inducing and/or encouraging a strike, work stoppage, a refusal to perform services . . . ," not merely subsection (ii) of § 8(b)(4). *Cf.* Pet. 6. Seven months later the NLRB issued a complaint based only on a violation of subsection (ii).

subject to American law.[14] App. at 32a, 34a, 41a-42a. Therefore, the Board had to attribute that conduct to the ILA by manufacturing an agency relationship. App. at 33a-38a. See also, App. at 4a, 10a. This gimmick was manifestly intended to do an end run around the limitation of the prohibitions of subsection (i) to domestic employees. The D.C. Circuit, properly deferring to Congress' deliberate choice to include the limitation, refused to permit the Board to twist agency principles so as to deform the legislative enactment. The immediate point, however, is that subsection (i) *does* apply when the induced employees are domestic. Petitioners' alarmist forecast that the decision below will insulate unions from liability for domestic inducement, Pet. 27, just isn't going to happen. The inducement of another domestic union to make threats would be a classic violation of subsection (i).[15]

The reasons why the petition should be denied are apparent immediately within its cover, —in the questions presented. The answer to the first question proposed by petitioners is so apparent that even Respondent ILA would agree. Of course, one union may be the agent of another for purposes of secondary boycott liability, —in the right circumstances, but not in the circumstances of this case. Question 1 would be better posed to a second year law student than to the Supreme Court of the United States.

The answer to the second question is also easily come by

---

[14] Petitioners' footnote 24, *see* Pet. 26, gives their game away. They note that in most other nations secondary boycotts are lawful. The Board's decision in this case was designed as a vehicle to allow American businesses to put an end to foreign conduct that, while perfectly lawful where performed, had an effect here. This venture in extraterritoriality was to be accomplished by conscripting the foreign unions under the NLRA as "agents" of domestic unions subject to the Act.

[15] As to the NLRA's lack of a prohibition against inducement of the employees of a foreign employer, petitioners' quarrel is with Congress for not providing a statutory proscription, not with the courts.

without the need of a pronouncement by the highest Court. No formal affiliation or right to control is necessary to find that a union violates the NLRA by encouraging and requesting another union to act, —provided that the second union represents employees of an employer in domestic commerce, so as to implicate § 8(b)(4)(i)(B) of the Act. The NLRB here did not find that Respondent ILA violated § 8(b)(4) by inducing or encouraging, as proscribed by subsection (i), but by threatening or coercing, as forbidden by subsection (ii). To perform that feat, even as it held that all of the unlawful conduct was that of the second, foreign union, the NLRB had to transform the statutory language "induce and encourage" into bogus agency concepts of authorization and ratification. The D.C. Circuit refused to permit this sophistry.

The futility of petitioners' application to this Court becomes apparent when one considers that they proffer here the selfsame arguments they made to the District of Columbia Circuit in their petitions for rehearing with suggestion for rehearing *in banc*, —importance of the case, conflict with other circuits, misapplication of agency law. The circuit court found none of these sufficient to warrant rehearing, nor should this Court find them grounds for granting the writ.

Finally, petitioners' claims of the importance of this case are belied by the attitude of the NLRB itself. That the principal unsuccessful party, the respondent and cross-petitioner before the court of appeals, did not in the first instance seek review by the Supreme Court or join in the petition speaks loudly with respect to the significance of the case. It speaks louder still when that party is the victim of what petitioners suggest is usurpation by the circuit court of the Board's role as policy maker and interpreter of the NLRA. It speaks trumpet-tongued when that party is the National Labor Relations Board, the agency charged with the administration of national labor law. If the Board in its expertise did not think this case

worthy of a petition for a writ of certiorari, petitioners' protests to the contrary can be viewed only as disappointed murmurings.

Nor can the matter be altered by whatever position the NLRB may take in the respondent's brief it will file on the petition of the intervenors below. Should the Board do an about face and now attempt to support the petition, its stance could be seen only as an afterthought, induced by a vain compulsion to uphold the NLRB's decision or by the proddings of the petitioners. In no wise could such a reversal by the Board be seen as a genuine conviction that the decision below requires further review. Indeed, the NLRB has had three opportunities to press that claim, —in a petition for rehearing to the D.C. Circuit, in responding to the petition for rehearing filed by the intervenors below, and in a petition to this court for a writ of certiorari. It defies belief that an agency of the United States would let those opportunities pass if it really believed that further review was appropriate to avoid the parade of horrors petitioners paint, *see* Pet. 12, including constraint of the Board's own ability to enforce the Act entrusted to it by Congress. Whatever position the NLRB may take in the brief to be submitted to this Court, the Board's real convictions in the matter are by now set in concrete and cannot be erased.

CONCLUSION

This case is but another instance of a court properly schooling an administrative agency to act within its legitimate statutory powers. The agency has apparently accepted the lesson, for it thrice let opportunities go by without seeking to disturb the court's decision. In its understanding of the Act, its analysis of the NLRB's decision and its application of common law agency principals, the District of Columbia Circuit's decision is unassailable. In its refusal to let stand the Board's atrocious manipulation of the law of agency, it is praiseworthy. There is simply no reason for review by this Court. The petition should in all respects be denied.

Dated: February 7, 1996

Respectfully submitted,

ERNEST L. MATHEWS, JR.
MAURA R. CAHILL
GLEASON & MATHEWS, P.C.
26 Broadway, 17th Floor
New York, New York 10004
(212) 425-3240

Counsel for Respondent International Longshoremen's Association, AFL-CIO